FILE COPY

FILED
FEB 19 1949
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1948

No. 576

STINSON CANNING COMPANY AND AMERICAN SURETY COMPANY, (399 CASES, MORE OR LESS, BEACH CLIFF BRAND MAINE SARDINES, ETC.), PETITIONERS,

versus

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

ROBERT E. McCARTHY and
HUGER SINKLER,
Counsel for Petitioners.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

SUBJECT INDEX TO PETITION

PAGE

Petition for Writ of Certiorari 1

Summary Statement of Matters Involved 1

Reasons Relied Upon for Allowance of Writ:

(1) Important Question of Federal Law Which Should Be Settled 6

(2) Conflict with Decision of Another Circuit Court 7

(3) Conflict with Decision of Same Circuit Court . 7

(4) Departure from Established Judicial Procedure 8

(5) Necessity for Exercise of This Court's Power of Supervision 8

Prayer for Writ 9

Brief In Support of Petition 11

TABLE OF CASES

PAGE

Continental Casualty Company v. U. S., 314 U. S., 527 . 15

Fresh Grown Preserves Corporation v. U. S., 143 Fed. (2d), 191 (Sixth Circuit, 1944) 7, 16

Hawks v. Hammill, 288 U. S., 52 16

Henry v. U. S., 288 Fed., 843 (Seventh Circuit, 1923) .8, 18

Isrig v. U. S., 109 Fed. (2d), 131 (Fourth Circuit, 1940) 8, 18

LaGrotta v. U. S., 77 Fed. (2d), 673 (Eighth Circuit, 1935) 8, 18

McLennan v. U. S., 12 Fed. (2d), 507 (Ninth Circuit, 1926) 15

Paris v. U. S., 137 Fed. (2d), 300 (Fourth Circuit, 1943) 7, 8, 16, 18

Skolnik v. U. S., 4 Fed. (2d), 797 (Seventh Circuit, 1925) 15

U. S. v. Burl, 67 Fed. Supp., 583 (D. C. E. D., Ill., 1946) 8, 18

U. S. v. Drewer, 158 Fed. (2d), 146 (Seventh Circuit, 1946) 8, 18

U. S. v. Feely, Fed. Cas., 15,082 15

U. S. v. Graham, 46 Fed. (2d), 639 (Eighth Circuit, 1931) 8

U. S. v. Kelleher, 57 Fed. (2d), 684 (Second Circuit, 1932) 15

U. S. v. Mack, 295 U. S., 480 .....7, 14

U. S. v. Smith, 5 F. R. D., 274 (D. C. W. D. Ky., 1946) .. 15

TABLE OF STATUTES

PAGE

18 U. S. C. A., Section 601 ..... 6, 14, 15

21 U. S. C. A., Section 301 ..... 2, 6, 16

21 U. S. C. A., Section 334 (d) 2, 14

28 U. S. C. A., Section 347 (a) 13

Federal Rules of Criminal Procedure, Rule 46 (f) (2), 18 U. S. C. A., foll., Section 687 15

Supreme Court of the United States

OCTOBER TERM, 1948

No. ____

STINSON CANNING COMPANY AND AMERICAN SURETY COMPANY, (399 CASES, MORE OR LESS, BEACH CLIFF BRAND MAINE SARDINES, ETC.), PETITIONERS,

versus

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF MATTER INVOLVED

This Petition raises two questions:

First, does there exist to the defaulting obligor of Performance Bonds posted pursuant to the Federal Food, Drug

and Cosmetic Act (21 U. S. C. A., Section 334(d)), whose Return avers that its course of conduct incident to the default was neither willful nor grossly neglectful the right to a trial of that issue?

Second, did the action of the United States District Court for the Eastern District of South Carolina in enforcing the full penalty of the Performance Bonds here involved constitute an abuse of judicial discretion requiring the exercise of this Court's power of supervision?

This case originally arose in April of 1947, when the United States, acting through its Pure Food and Drug Administration, instituted libel proceedings under the Federal Food, Drug and Cosmetic Act (U. S. C. A., Title 21, Sections 301 *et seq.*) against eight (8) lots of canned sardines. These libels alleged that the sardines were diseased and should be condemned. The nature of the proceedings in the District Court for the Eastern District of South Carolina was identical to eleven (11) other proceedings instituted in Federal District Courts throughout the Country, involving other lots of canned sardines, in which the Petitioner, Stinson Canning Company, was interested.

After the institution of the condemnation proceedings, the Petitioner, Stinson Canning Company, intervened as the owner of these sardines. Later, on October 11th, 1947, it consented to Decrees condemning the sardines, which provided that it might retake possession of the condemned lots if it posted bonds in an amount approximately double* the value of the sardines, conditioned that it segregate cans or cases containing diseased fish from cans or cases containing no diseased fish, within three months following the entry of the Decrees, under the supervision of the Pure Food and

* In the course of its Opinion, the Court of Appeals stated that the amount of the Bonds equalled the value of the sardines. This error arose from a statement in the Petitioners' opening Brief in that Court, an error which was corrected during the course of oral argument.

Drug Administration. Suitable bonds, aggregating Twenty Thousand Twenty ($20,020.00) Dollars, were posted. On each of these bonds, the Petitioner, Stinson Canning Company, was principal, and the Petitioner, American Surety Company, was surety.

After the posting of these bonds, the sardines were shipped to Maine for segregation under the supervision of the Boston Station of the Pure Food and Drug Administration. Similar action was taken in most of the other eleven (11) proceedings brought in jurisdictions other than South Carolina.

On January 19th, 1948, after application had been made by counsel for the Petitioner, Stinson Canning Company, for a 60-day extension of time, orders were issued by the District Court extending the time for the performance by Stinson Canning Company until 90 days after that date. These Orders stated that no further extensions should be applied for.

Two days before the expiration of the 90-day period, Louis M. Shimel, Esq., an Assistant United States Attorney in Charleston, telephoned the Atlanta office of the Pure Food and Drug Administration, to ascertain if the claimant had complied with the terms of the Decrees. The written reply of the Chief of the Atlanta Station of the Food and Drug Administration stated that performance had not been effected, and that he would advise Mr. Shimel if compliance were subsequently effected, stating that he wished to be notified of any proposals that the claimants might make other than a request for a reasonable time to destroy the condemned articles (Record 5).

On May 25th, 1948, motions were made, returnable on June 7th, 1948, for Judgment on the Bonds. Attached to the moving papers were certain communications from the Atlanta Station of the Food and Drug Administration.

None of these requested that action be taken to estreat the Bonds.

On the Return Day, Robert E. McCarthy, of Boston, General Counsel for the Petitioner, Stinson Canning Company, and Huger Sinkler, of Charleston, local counsel for that concern, appeared in Charleston at the Chambers of the United States District Judge. It was explained to the Court that Mr. McCarthy had just arrived in Charleston and, for that reason, counsel had not had sufficient time in which to prepare a formal written Return.* A stenographer was then asked for by Petitioners' counsel, and Mr. McCarthy made an oral Return to the Motions. He stated that he was general counsel for Stinson Canning Company in the several libel proceedings brought by the United States throughout the Country. That, upon the return of the sardines to Maine, it had been determined that segregation was impossible. That he had communicated this information to the Boston Station of the Pure Food and Drug Administration, and had suggested the possibility of the exportation of the sardines in view of the world-wide food shortage, which this Country was attempting to alleviate. He explained that while the sardines were subject to a fungus disease in excess of the 5% tolerance allowed by the Pure Food and Drug Administration, other countries permitted a higher tolerance, and that, as it was felt that all of the sardines would come within the higher tolerance permitted by such countries, efforts were being made to secure Orders permitting the exportation of the sardines. McCarthy stated that he had advised the Boston Station that he had made a Motion to Amend the Decree in the libel suit which had been brought in the Western District of New York, at Buffalo, and that the proceedings in connection with his

* No question has ever been raised by the United States as to the form of the Petitioners' Return to the District Court and no contention has ever been made that it should have been in written form.

Motion there were awaiting the outcome of an appeal in other litigation involving the question of whether it was within the power of the District Court to permit condemned articles of foodstuff, originally intended for domestic consumption, to be shipped in export. He stated that he had informed a Mr. Sullivan, of the Boston Station, that it was his intention to use the Buffalo case as a test case and to abide by its disposition with respect to the other cases pending throughout the Country. He, frankly, conceded that he had been negligent in failing to file a proper Motion before the District Court in South Carolina, but assured the Court that his action was not in bad faith, and that if the sardines could not be exported they would be destroyed.

At the conclusion of this oral Return, counsel for the Petitioners unsuccessfully sought to ascertain from the Assistant United States Attorney if the Pure Food and Drug Administration had requested the institution of the proceedings to estreat the Bonds. Counsel then sought a hearing at which they might introduce testimony to sustain the oral Return. The District Court refused this request, further refused counsel permission to argue the sufficiency of the Return, and peremptorily ordered judgment against the Petitioners for the full amount of the Bonds.

An appeal from these Judgments to the United States Court of Appeals for the Fourth Circuit was taken. The decision of that Court (Record 30-35) rendered on November 10th, 1948, affirmed the action of the United States District Court. This decision denied to the Petitioners the right to introduce testimony to sustain its plea of good faith, thus refusing a trial on the question of whether the defaults were willful or grossly neglectful, the Court holding that the record in the District Court showed grossly neglectful behavior.

A timely Petition for a Rehearing, again urging the Petitioners' right to try the issue of good faith, was filed in the Circuit Court of Appeals on December 7th, 1948 (Record 36-44). This Petition was refused on January 3rd, 1949 (Record 46).

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The Petitioners respectfully advance the following reasons for the allowance of the Writ:

I

This case involves an important question of Federal law, which has not, but which should be settled by this Court. It is the question of the right of a defaulted obligor of a performance bond (posted pursuant to the Federal Food, Drug and Cosmetic Act (21 U. S. C. A., Sections 301 *et seq.*) to a trial upon the issue of good faith, where it is alleged that the conduct responsible for the default was neither willful nor grossly neglectful. This question has not heretofore been passed upon by this Court.

The affirmative answer to the question, sought by the Petitioners, is premised upon the proposition that there exists in the District Courts the basic common law power of remission if the conduct responsible for the default was neither willful nor grossly neglectful. It is recognized by the Petitioners that if the Federal Courts do not have this power any technical default would afford the basis for peremptory judgment on the bonds for the Statute itself does not grant the power of remission to the District Courts. The situation is identical to that which existed in cases involving defaulted recognizance or bail bonds prior to the passage of the Congressional Act of February 28th, 1839, now codified in its latest form as 18 U. S. C. A., Sec-

tion 601. This Court has never specifically held that the common law power of remission exists, although in the course of its opinion in the case of *U. S. v. Mack,* 295 U. S., 480, it takes for granted that such power was, in fact, an inherent power of the Federal Judiciary.

II

The decision in this case is in conflict with the holding of the United States Court of Appeals for the Sixth Circuit in the case of *Fresh Grown Preserves Corporation v. United States,* 143 Fed. (2), 191 (1944). In that case, the Sixth Circuit held that when there existed the issue of whether the default of an obligor of a bond posted pursuant to this Act was willful a trial should be held to determine the question of good faith. The *Fresh Grown Preserves Corporation case* and this case are the only reported decisions involving this question in connection with bonds posted pursuant to this Act.

III

The decision of the United States Court of Appeals for the Fourth Circuit in the instant case is in conflict with the principle established only five years earlier by its own decision, in the case of *Paris v. United States,* 137 Fed. (2), 300 (1943). In that case, the Court of Appeals for the Fourth Circuit reversed the action of this same District Court for failing to try the question of whether the default of the principal of a bail bond was willful, reversed the judgment granted on the bail bond, and directed the District Court to conduct a hearing and make specific findings of fact as to the good faith of the principal on the bond.

IV

Established judicial procedure takes for granted that a hearing will be held and specific findings made wherever a plea of good faith is made as a defense to a proceeding for judgment on a penal bond. In the analogous situation existing in connection with the defaulted bail bonds hearings were held or taken for granted in the following cases:

U. S. v. Drewer, 158 Fed. (2), 146 (Seventh Circuit, 1946);

Paris v. U. S., 137 Fed. (2), 300 (Fourth Circuit, 1943);

Isrig v. U. S., 109 Fed. (2), 131 (Fourth Circuit, 1940);

LaGrotta v. U. S., 77 Fed. (2), 673, (Eighth Circuit, 1935);

U. S. v. Graham, 46 Fed. (2), 639 (Eighth Circuit, 1931);

Henry v. U. S., 288 Fed. 843 (Seventh Circuit, 1923);

U. S. v. Burl, 67 Fed. Supp., 583 (D. C. E. D. Ill., 1946).

V

The unusual and severe punishment imposed upon the Petitioners by the District Court upon the record before it, and the action of that Court in peremptorily refusing Petitioners the opportunity to present witnesses and Petitioners' counsel the opportunity to argue in a proceeding involving so large a sum constitutes an abuse of judicial discretion improperly sanctioned by the United States Court of Appeals for the Fourth Circuit, and requires the exercise by this Court of its power of supervision in order to prevent the miscarriage of justice.

Wherefore your Petitioners respectfully pray that a Writ of *Certiorari* be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Fourth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; that the judgments granted by the United States Court for the Eastern District of South Carolina be reversed by this Honorable Court; that the United States Court for the Eastern District of South Carolina be directed to try the issue of good faith; and, that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

ROBERT E. McCARTHY and

HUGER SINKLER,

Counsel for Petitioners.

Dated: February 10th, 1949.

BRIEF IN SUPPORT OF PETITION

SUBJECT INDEX TO BRIEF

PAGE

The Opinion Below 13

Jurisdiction 13

Statement of the Case 13

Argument 13

THE OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit, dated November 10th, 1948, is printed in full in the Record (Record 30). It is reported at 170 Fed. (2), 764.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (28 U. S. C. A., Section 347(a)). The decision of the United States Court of Appeals for the Fourth Circuit, affirming several judgments rendered by the United States Court for the Eastern District of South Carolina, was filed November 10th, 1948. A timely Petition for Rehearing was filed in that Court on December 7th, 1948. This Petition for Rehearing was denied by the Court of Appeals on January 3rd, 1949 (Record 46). A Petition to Stay the Mandate of that Court was filed, and by its Order dated January 13th, 1949, the Mandate of the Circuit Court of Appeals was stayed upon the condition that the Petition for Certiorari be filed with this Court on or before February 13th, 1949.

STATEMENT OF THE CASE

The relevant facts are set forth in the Petition and will not be restated except when discussion of the questions involved makes references thereto necessary.

ARGUMENT

This case raises two questions, which may be set out as follows:

1. Does there exist to the defaulting obligor of Performance Bonds posted pursuant to the Federal Food,

Drug and Cosmetic Act (21 U. S. C. A., Section 334(d)), whose Return avers that its course of conduct incident to the default was neither willful nor grossly neglectful the right to a trial of that issue?

2. Did the action of the United States District Court for the Eastern District of South Carolina in enforcing the full penalty of the Performance Bonds here involved constitute an abuse of judicial discretion requiring the exercise of this Court's power of supervision?

I

The right of a defaulted obligor of a Performance Bond, posted pursuant to the Federal Food, Drug and Cosmetic Act (21 U. S. C. A., Section 334(d), to a trial, where its Return to a Motion for Judgment on such Bond raises the question of good faith is a question not yet passed upon by this Court.

It is, of course, obvious that before there can be such right to a trial there must first exist a power in the Court to remit the forfeiture in whole or in part. The Statute, pursuant to which this bond was posted, does not confer this power upon the Court. It, therefore, becomes necessary to determine if the power is an inherent one. This Court has never passed upon this particular question. Only two cases seem to have arisen under this Statute, but the situation is entirely analogous to that which existed in the case of defaulted recognizance or bail bonds prior to the passage of the Congressional Act of February 28th, 1839, now codified in its latest form as 18 U. S. C. A., Section 601, and prior to the adoption of the Criminal Rule 46(f)(2). This Court has never held that the power to remit a defaulted bond is a power inherent in the Federal Judiciary. But, in the course of its Opinion in the case of *United States v. Mack*, 295 U. S., 480, Justice Cardozo

states that a power to remit did exist, pointing out that it had been exercised from distant times both in the English Courts and in this Country. In the more recent case of *Continental Casualty Company v. U. S.*, 314 U. S., 527, there was certified to this Court by the Third Circuit Court of Appeals a question which if answered would have defined the extent of this power in the Federal Judiciary, but this Court, having found that the exclusive power of the District Courts to remit the forfeiture of the penalty on recognizances taken in criminal causes was the Statute (18 U. S. C. A., Section 601), found it unnecessary to answer this question. In passing, it seems worthy of note that the provisions of Rule 46(f)(2) of the Federal Rules of Criminal Procedure which became effective March 21st, 1946, further enlarged the powers of the District Courts in instances of bail forfeitures. Cf. *U. S. v. Smith*, 5 F. R. D., 274 (D. C. W. D. Ky.) (1946).

Fortunately the absence of a holding by this Court on this question does not indicate a lack of general authority. Noteworthy among the authorities for the proposition that the power of remission is an inherent power is the opinion of Chief Justice Marshall, sitting as a Circuit Justice, rendered in the early case of *United States v. Feely*, Federal Cases, 15,082, decided in 1813. After tracing the evolution of this power in the English Courts, the Chief Justice held,

> "At present, the law is understood to be that this Court possesses full power over the subject."

This opinion has been frequently cited with approval by Federal Courts.*

The Petitioners, therefore, feel satisfied that this Court will accept as sound law the proposition that the discre-

* The following constitute a partial list:
Skolnik v. U. S., 4 Fed. (2), 797 (Seventh Circuit, 1925);
McLennan v. U. S., 12 Fed. (2), 507 (Ninth Circuit, 1926); and,
U. S. v. Kelleher, 57 Fed. (2), 684 (Second Circuit, 1932).

tionary power to remit is one inherent in the Federal Judiciary.

As already noted, there have been only two cases arising under this Statute (U. S. C. A., Title 21, Sections 301 *et seq.*), where it has been contended that upon a Return alleging good faith a trial should be had upon that question. The first is the case of *Fresh Grown Preserves Corporation v. United States,* 143 Fed. (2), 191, 195, in which the Circuit Court of Appeals for the Sixth Circuit propounded the following proposition of law:

> "Appellant contends further that its right to a trial of contested issues was denied by the entry of judgment on the bond merely on motion supported and opposed by affidavits. This argument would rest on solid ground if the record revealed a factual basis for it. Were a material issue of fact presented by conflicting affidavits, either party would be clearly entitled to introduce its own witnesses and to cross examine those of its opponents."

Petitioners must, of course, concede that the holding here was not necessary to the decision of the Sixth Circuit for the reasons stated by that Court. But the statement set forth above must rank as a considered dictum with the "capacity to tilt the balanced mind toward submission and agreement." Cf. *Hawks v. Hammill,* 288 U. S., 52, 59.

The decision of the United States Court of Appeals for the Fourth Circuit in the instant case is totally repugnant to the holding of that Court in the case of *Paris v. United States,* 137 Fed. (2), 300. The *Paris case* like the instant case involved an appeal from the same District Court. Paris, principal on the bond, had been directed to appear for trial on the first day of a succeeding criminal term of Court. On the day when the Court convened, he failed to appear and the Court directed that his bond be

estreated, and a bench warrant issued. After the adjournment of the Court, Paris was apprehended and afterwards made Return to a Rule to Show Case why his bond should not be estreated. He asserted that his failure to appear was the result of a misunderstanding and a misapprehension, and made reference to conversations between himself and the United States Attorney. The District Court ruled that this Return did not suffice. In reversing this judgment, the Court of Appeals for the Fourth Circuit, after first observing that the purpose of the bond was not to enrich the treasury but to secure the appearance of the accused, remanded the case to the District Court, directing it to make specific findings of fact and to determine, in the light of such findings, if the default took place in good faith. By its decision in the *Paris case,* this Court of Appeals has established the principle that upon a plea of good faith, the defaulted obligor of a penal bond is entitled to a trial to determine if his plea is in fact well taken, with the resulting corollary that where good faith is established, sound judicial discretion requires the remission of the bond in whole or in part. The effect of the holding of the Court of Appeals in the instant case is to ignore the principle which it has previously established, a result not less glaring because of its failure to refer to the *Paris case* or other authorities in its opinion.

Perhaps, it should be now observed that the purpose of the bond required by this statute is likewise not to enrich the treasury but to assist an important administrative branch of the United States Government in the enforcement of a law.

While Petitioners have found no other decisions by Federal Courts specifically holding that the principals of bail bonds are entitled to formal trials where they enter a plea that the default was in good faith, the Federal Courts

seem to have accepted without question the fact that a trial on that issue is accepted judicial procedure. Among the cases indicative of this fact are the following:

U. S. v. Drewer, 148 Fed. (2), 146 (Seventh Circuit, 1946);

Paris v. U. S., 137 Fed. (2), 300 (Fourth Circuit, 1943);

Isrig v. U. S., 109 Fed. (2), 131 (Fourth Circuit, 1940);

LaGrotta v. U. S., 77 Fed. (2), 673 (Eighth Circuit, 1935);

Henry v. U. S., 288 Fed., 843 (Seventh Circuit, 1923); and,

U. S. v. Burl, 67 Fed. Supp., 583 (D. C. E. D. Ill., 1940).

II

Counsel fully recognize that the charge that a Court has abused its judicial discretion is one that should not be lightly made, but with recognition of the full implication of such a charge, the Petitioners respectfully contend that the following clearly establish an abuse of judicial discretion on the part of the District Court, requiring the exercise by this Court of its power of supervision and correction:

1. There was no showing that the administrative agency, vested by Congress with large discretionary powers in the enforcement of the Act, requested that action be taken to enforce the bonds.

2. The Return states, and the Record thus made indicates that there was strong evidence, that the Pure Food and Drug Administration was satisfied with the arrangements made with respect to the disposition of the condemned sardines.

3. The Assistant United States Attorney, in charge of the matter, refused to inform the Court as to whether the Pure Food and Drug Administration had requested this action.

4. Such exhibits as were presented by the United States indicate clearly that the Pure Food and Drug Administration was not opposed to a further extension of time within which the owner might destroy the condemned sardines.

5. The Court failed to fully inform itself as to all facts of the case, precluding itself from so doing by refusing a brief extension of time, within which testimony might have been brought before it to establish that responsible persons in the Pure Food and Drug Administration sanctioned the course of conduct taken by Petitioners' General Counsel.

6. There was no such urgency which prevented the granting of reasonable time within which to secure testimony to corroborate the Return. Cf. *Paris v. United States, supra,* wherein the Fourth Circuit Court of Appeals included in its reasons for reversing the District Court's action in establishing the bail bond in that case, the failure of that Court to grant an extension of time for a desired witness to appear and testify.

7. In granting judgment upon a record which, while evidencing neglect on the part of the obligor, clearly establishes that the default was in good faith and not due to willfulness or gross neglect on its part.

8. In refusing counsel for Petitioners the right to argue the sufficiency of their client's plea in a matter involving so large a sum of money.

The opinion of the Fourth Circuit Court of Appeals contains the implication that Petitioners had argued that the District Court's Decrees had been amended by third

party agreements. Such was never the argument. The question was not the effectiveness or the efficacy of such agreements, but simply whether the agreement tended to establish the plea of good faith. Perhaps, the conduct of the Petitioners in failing to keep the District Court of the United States fully informed and to make appropriate motions for further extensions of time was negligent, and, perhaps, although not so intended, even disrespectful to that Court, but surely the action of the District Court in granting judgment for the full amount of the bonds is so harsh as to be offensive to all generally accepted notions of justice.

Respectfully submitted,

ROBERT E. McCARTHY, and

HUGER SINKLER,

Counsel for Petitioners.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	11

CITATIONS

Cases:

Clark v. *Barnard*, 108 U. S. 436	8
Fresh Grown Preserve Corp. v. *United States*, 143 F. 2d 191	8, 10, 11
Fresh Grown Preserves Corporation v. *United States*, 144 F. 2d 136	8
Paris v. *United States*, 137 F. 2d 300	8
United States v. *Dieckerhoff*, 202 U. S. 302	8
United States v. *Kent Food Corporation*, 168 F. 2d 632, certiorari denied, 335 U. S. 885	10

Statute:

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, section 304, 52 Stat. 1040, 1044 (21 U.S.C. 334)	2
18 U.S.C. 646 (1946 ed.), now 18 U.S.C. 3617	8

Miscellaneous:

Rule 46(f), F. R. Crim. P.	8

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 576

STINSON CANNING COMPANY AND AMERICAN SURETY COMPANY (399 CASES, MORE OR LESS, BEACH CLIFF BRAND MAINE SARDINES, ETC.), PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 30-35), is reported at 170 F. 2d 764.

JURISDICTION

The judgment of the Court of Appeals was entered November 11, 1948 (R. 35), and a petition for rehearing (R. 36-45) was denied January 3, 1949

(R. 46). The petition for a writ of certiorari was filed February 19, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon a finding that the claimant had failed over a period of eight months to comply with decrees entered pursuant to the Federal Food, Drug, and Cosmetic Act condemning certain lots of canned sardines and providing for their release to the claimant for the purpose of segregating, if possible, the diseased and undiseased sardines and destroying the former, the District Court abused its discretion in ordering the forfeiture of performance bonds without affording the claimant further time and opportunity to show that its default was not wilful or the result of gross neglect.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, section 304, 52 Stat. 1040, 1044 (21 U.S.C. 334), provides in part:

> (a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found. * * *

* * * * *

(d) Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such article shall not be sold under such decree contrary to the provisions of this Act or the laws of the jurisdiction in which sold: *Provided,* That after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such article shall not be sold or disposed of contrary to the provisions of this Act or the laws of any State or Territory in which sold, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this Act under the supervision of an officer or employee duly designated by the Administrator, and the expenses of such supervision shall be paid by the person obtaining release of the article under bond. * * *

(e) When a decree of condemnation is entered against the article, court costs and fees, and storage and other proper expenses, shall be awarded against the person, if any, intervening as claimant of the article.

STATEMENT

In April 1947, separate libels were filed in the District Court for the Eastern District of South

Carolina under the Federal Food, Drug, and Cosmetic Act, *supra,* for the condemnation of eight lots of canned sardines on the ground that they were diseased (see R. 3, 8, 25, 30). Petitioner Stinson Canning Company intervened and claimed ownership of the sardines (R. 19, 30). It admitted the allegations of the libels and consented to the entry of decrees of condemnation (R. 19, 25). Consent decrees were accordingly entered on October 11, 1947, which provided, in accordance with Section 304(d) of the Act, *supra,* that petitioner Stinson could retake possession of the condemned sardines upon posting bonds in specified amounts, conditioned upon the following undertakings: Stinson would proceed to segregate the sardines so as to effect a separation of the cases or cans containing diseased fish from those containing fish not diseased. If such a segregation were accomplished to the satisfaction of a representative of the Food and Drug Administration, only the cases or cans found to contain diseased fish were to be destroyed; otherwise, the entire lots were to be destroyed. The decision of the Food and Drug Administration as to whether the salvage operation had been satisfactorily completed was to be final. Stinson was not to ship or sell, or offer to ship or sell, any of the sardines until they were released by the Food and Drug Administration. A time limit of three months from the entry of the decrees was imposed for the segregation and destruction of the sardines.

The District Court expressly retained jurisdiction of the proceedings, and the decrees further provided that in the event of default by Stinson in the performance of any of the specified conditions, the bonds should be forfeited on motion of the Government, and judgment entered thereon. (R. 25-27.)

Bonds in the aggregate amount of $20,020, conditioned upon these undertakings, were filed by petitioner Stinson as principal and petitioner American Surety Company as surety (R. 21, 23, 30). Stinson then shipped the sardines to its plant in Maine, but they remained unsegregated and undestroyed at the end of the three-month period (see R. 4). On January 19, 1948, a 90-day extension, to April 18, 1948, was granted by the District Court, with the proviso "that no further extension shall be applied for by the said Claimant" to perform the acts required by the decrees (R. 28; see also R. 22).

On May 25, 1948, a motion was filed by the Government for judgment on the bonds and for an order directing the destruction of the condemned sardines on the ground that petitioner Stinson had not complied with the terms of the decrees of October 11, 1947. The motion papers, which were served upon petitioners (R. 22-23), recited that Stinson had failed either to separate or destroy the sardines, and had not indicated to the Food and Drug Administration if and when they intended to destroy them, despite the efforts of that agency to

cooperate in the supervision of performance with the provisions of the decrees (R. 3-7).

No written return was filed in opposition to the motion, but on the day set for the hearing, June 7, 1948, counsel for petitioner Stinson appeared before the District Court and, as an oral return, stated that it had been found impractical to segregate the sardines and admitted that they had not been destroyed. A motion was made at that time for modification of the decrees to permit export of the condemned articles. Counsel explained to the court that the tolerance for diseased sardines shipped abroad was higher than that permitted by the Food and Drug Administration for domestic consumption, and, in view of the food shortage in other countries, use might be made of the condemned sardines. Counsel stated further that he had made a similar motion in another proceeding which was pending in the federal district court at Buffalo, New York, and that action on such motion was being held in abeyance pending a decision on the issue in another case by the Court of Appeals for the Second Circuit. Counsel also stated that he had informed a Mr. Sullivan of the Boston Station of the Food and Drug Administration that he intended to use the Buffalo proceeding as a test case to govern the disposition of several libels involving Maine sardines which were pending in various parts of the country. (R. 8-11, 17.) He admitted, however, that he had been advised that the Food

and Drug Administration was opposed to the granting of permission to export food which had been condemned (R. 10-11, 12).

The motion to amend or modify the decrees to permit export of the sardines was denied on its merits and for untimeliness (R. 17, 24). The District Court also denied a continuance to permit petitioner Stinson to produce Mr. Sullivan to support its contention that it had not acted in bad faith in not complying with the terms of the decrees (R. 18-19). The court found that Stinson had been guilty of dilatory conduct, that the return was inadequate, and that petitioners were in default on the performance bonds (R. 17, 23-24). Judgments in the amount of each of the bonds, together with the costs of the proceedings, were awarded to the Government (R. 24, 30).

On appeal to the Court of Appeals for the Fourth Circuit, the judgments were affirmed (R. 35).

ARGUMENT

It is clear that the failure of petitioners to segregate and destroy the condemned sardines within the prescribed time constituted a breach of the conditions of the bonds. Petitioners contend in effect that their oral return to the Government's motion for judgment on the bonds raised an issue of good faith in respect of the default and, therefore, they were entitled to a trial of that issue. This contention is based upon the premise that the District Court had power to remit all or part of the penalty

upon a finding that the default did not result from gross neglect or bad faith.

These bonds were penal and not indemnatory. *Fresh Grown Preserve Corp.* v. *United States,* 143 F. 2d 191 (C.A. 6); *Fresh Grown Preserves Corporation* v. *United States,* 144 F. 2d 136 (C.A. 4). On the breach of the conditions, the Government was entitled to recover the full amount without proof that any damages had been sustained. *Clark* v. *Barnard,* 108 U. S. 436; *United States* v. *Diecker-hoff,* 202 U. S. 302. We do not believe that the District Court had power to remit any part of the bonds after determining that the conditions had been broken. Congressional approval of judicial remittance of penal bonds appears to be limited to bail bonds.[1] See Rule 46(f), F. R. Crim. P.[2] But, as the Court of Appeals properly observed (R. 32), it is unnecessary to consider that question, for it is clear in any event that the District Court was fully

---

[1] Cf. 18 U.S.C. 646 (1946 ed.), now 18 U.S.C. 3617.

[2] *Paris* v. *United States,* 137 F. 2d 300 (C.A. 4), upon which petitioners rely (Pet. 7) as establishing a principle in conflict with that of the decision below (the same court decided both cases), holds merely that since a district court has discretion to remit the penalty on a *bail* bond, a proper exercise of discretion required the court to give consideration to the defendant's explanation that his default was induced by representations of the district attorney and thus was not wilful. In the case at bar, on the other hand, apart from the distinction that remission is probably not available in any event, it is clear that even if full acceptance were accorded to Stinson's excuse for noncompliance with the decrees, the District Court properly exercised its discretion in holding the excuse insufficient and in ordering a forfeiture of the bonds.

justified in decreeing forfeiture in full. The trial judge found that "the whole course of this case has been one of complete dilatory action on behalf of the claimant" (R. 17). In its opinion, the Court of Appeals reviewed at length the factual basis for this finding and agreed that petitioners' conduct was "extremely dilatory" (R. 33) and that "They have offered an utterly insufficient excuse for such grossly neglectful behavior" (R. 34).

Petitioners were admonished on January 19, 1948, after the original three months' period for compliance had expired, that an extension of 90 days was granted with the express understanding that no application would be made for any further extension (R. 28). Petitioners had almost eight months, from the entry of the decrees (October 11, 1947) until the return date of the Government's motion for judgment on the bonds (June 7, 1948), to perform their undertakings. They were notified by the court in advance that judgment would be granted against them unless the matter was disposed of within the time limit (R. 11). Despite these explicit directions, petitioners disregarded the efforts of the Food and Drug Administration to cooperate in the segregation and destruction of the diseased food and made no attempt to comply with the provisions of the decrees (R. 3-7). Noncompliance persisted right up to the hearing on the motion for forfeiture (see R. 13).

The return of petitioners did not raise any material issue of fact. The decrees required them either

to segregate the condemned sardines and destroy that part which was diseased or to destroy the entire lots. If, as petitioners contend, Stinson contemplated resort to a third alternative, i.e., the exportation of the sardines without segregation (a procedure, incidentally, which has not received either administrative or judicial approval, *United States* v. *Kent Food Corporation,* 168 F. 2d 632 (C.A. 2), certiorari denied, 335 U. S. 885), it was incumbent upon them at least to ask the District Court to modify its decrees, instead of ignoring them completely until the hearing on the motion for forfeiture of the bonds.

Petitioners urge (Pet. 7) that the decision in this case is in conflict with *Fresh Grown Preserve Corp.* v. *United States,* 143 F. 2d 191 (C.A. 6). To the contrary, the two decisions are entirely consistent. In the case cited, the claimant filed an affidavit in opposition to the motion for forfeiture in which it stated that its failure fully to comply with the provisions of the decree "was not occasioned through any fault of the claimant" but was due to the failure of the Food and Drug Administration to cooperate in the supervision of its performance. The court held that this attempted justification did not raise any material issue of fact, since the only issue was whether the claimant had actually complied with the decree. "The course pursued by the agency appears to have been either arbitrary or neglectful, but this afforded appellant no right to

violate the law. The appellant's appropriate course would have been to move the district court for an order directing the Federal Agency to perform forthwith its function under the decree. The aid of the court was not thus invoked. To the contrary, appellant deliberately violated the court's order by its own admission." 143 F. 2d at 196.

Likewise, in the case at bar, if petitioners' return to the motion for forfeiture had raised an issue whether or not they had complied with the provisions of the decrees, they would have been entitled to a hearing on that issue. But no such issue was presented and the trial judge properly exercised his discretion in refusing to grant any further extensions of time for compliance with the decrees.

CONCLUSION

The judgment below is clearly correct and no conflict of decisions is involved. Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
HAROLD D. COHEN,
Attorneys.

MARCH 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 839898 800